No. 15219

United States Court of Appeals

for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; EDWARD R. ESTER and LORRAINE M. ESTER, His Wife,

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Brief of Joint Appellants Barnett, Owens and Ester

Appeals from the United States District Court for the Western District of Washington, Northern Division.

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JURISDICTIONAL STATEMENT

This is a joint appeal by defendants Arthur G. Barnett, and Donald F. Owens, and respective marital communities, and Edward R. Ester and marital community from a judgment (R. 114) of the District Court of the Western District

of Washington, Northern Division, entered April 26, 1956. They are referred to herein as Barnett, Owens and Ester. These joint appellants must not be confused with two other appellants who were parties to the contract sued upon, to-wit: VIRGIL J. PAGUE and the CENTURY INVESTMENT CORPORATION. The case was based on a complaint (R.3) of the United States alleging jurisdiction under Title 28, U.S. C. Sec. 1345. Jurisdiction of this court is conferred by Title 28, U.S.C. Sec. 1291. The pleadings showing said jurisdiction appear in the record at R.120-125 inclusive.

STATEMENT OF THE CASE

Joint appellants, Ester, Barnett and Owens, appeal from a joint and several judgment against Ester and Century Investment Corporation in the sum of $2,432.59 (R.116c), plus an additional joint and several judgment in the sum of $1,937.25 against Ester, Century Investment Corporation, Barnett and Owens, and Virgil J. Pague for the Special Master's fee in the sum of $1,937.25 (R.116, item 2); and from a joint and several judgment against Barnett and Owens and Century Investment Corporation in the sum of $3,709.31 (R.116b), plus the joint and several liability for the Special Master's fee referred to above in the sum of $1,937.25. The judgments were for damages allowed for the violation of a contract for the sale and off-site removal of certain war housing buildings (R.62-63, 115; plaintiff's Exs. 3, 4, 5, 6, 7; R.4-6, 10, 22).

Barnett, Owens and Ester contend that Supplemental Findings of Fact I and II (R.107-108) and Supplemental Conclusion of Law I (R.111-112) fail to support the judgment based thereon; and that the action must be dismissed as to them. They contend that, as fee owners of their respective lands, they cannot be ordered to account for rents from properties which had reverted to them by operation of law because of the default of the plaintiff in paying just compensation for a condemned estate from year to year. Finally, they contend that they cannot be liable under a contract to which they are not parties. And, if these propositions be true, they contend that a reference to a Special Master as to them was erroneous, and that, in any event, the Special Master's Report is clearly erroneous, his work poor, and his fee exorbitant.

It is further contended that the court committed error in denying motions to dismiss for failure of the complaint to state a claim and, after trial, for failure to prove a claim upon which judgment could be founded. This has made it necessary to summarize the plaintiff's complaint and the answers of Barnett, Owens and Ester in the portion of this brief devoted to argument on specification of error No. 2. The pleadings will be helpful in obtaining further understanding of the case, in addition to showing the issues not met by the court in its findings of fact and conclusions of law.

SPECIFICATION OF ERRORS

The specification of errors by Barnett, Owens and Ester follow the statement of points (R.144), and are grouped as follows:

1. Supplemental Findings of Fact I and II (R.107-108) and Supplemental Conclusion of Law (R.111) fail to support the judgment, and instead, support a judgment of dismissal as to these joint appellants. Consequently, Supplemental Findings of Fact III, V, VI, VII and VIII (R.108-111) and Supplemental Conclusions of Law II, IV, V and VI (R.112-113), are clearly inconsistent and erroneous:

Barnett, Owens and Ester, being the owners of the land underlying the buildings (R.68, Par. XI, introductory finding; R.69c; R.70d; R.107 introductory paragraph), and not being parties to the contract sued upon, and there being no other findings justifying the assessment of damages against them, there is no basis in law or fact on which to sustain the judgment as to them. For the same reason, no damages can be assessed against Barnett, Owens and Ester, because, as fee owners, they are not required to make an accounting of rents from properties which had reverted to them by operation of law as the result of the default of the plaintiff in failing to pay decreed just compensation. The judgment rendered should be against the parties to the contract, to-wit, A. E. Sherman, (R.64 par III) and his alter ego, Virgil J. Pague, (R.64 par. IV) appellant herein, and the Century

SPECIFICATION OF ERRORS (Cont.)

Investment Corporation, appellant herein, as assignee of the contract (R.65 par. V) from Sherman and Pague.

2. The denial by the court (R.48) of the motions of Barnett, Owens and Ester to dismiss them before trial on the ground that the plaintiff's complaint failed *to state* a claim (R.22-23), and the denial of the motion (R.119) to dismiss them after trial for the plaintiff's failure *to prove* a claim on which judgment could be based (R.118, item II).

3. Error is claimed to the ruling of the court (R.115) confirming and adopting the Special Master's reports (R.84; 85-91). Joint appellants, Barnett, Owens and Ester, objected (R.97-105 incl.) on the grounds that the Special Master:

(a) Discriminated against Barnett, Owens and Ester in failing to apply the same accounting methods to them as he did to the other appellants on exactly the same kinds of buildings, repair items, etc., and compelling Barnett, Owens andEster to capitalize over many years identical items allowed to other appellants as an expense deduction in the year incurred:

(b) Did not apply the proper depreciation schedules;

(c) Committed clear error and was inconsistent in his own work;

(d) Was allowed an exorbitant fee for the amount of time and money involved, being in excess of the compensation of a Federal judge; did poor and substandard work.

SUMMARY OF ARGUMENT

1. Supplemental Findings of Fact I and II (R.107-108) state that it was incumbent upon plaintiff to prove its exclusive right of possession to the land involved at all times material to the action, and that the *plaintiff had not sustained that burden* and *had not proved payment of just compensation* and that the plaintiff was therefore not entitled to an order specifically compelling removal of the buildings. These Supplemental Findings support the Supplemental Conclusion of Law I (R.111-112) that the plaintiff failed to prove its exclusive right of possession to the lands involved at all times material to this action and was not therefore entitled to an order compelling the owners of the land to remove the buildings and clear the sites. On these supplemental findings and this supplemental conclusion of law, the judgment should have been one of dismissal of the landowners, joint appellants, Barnett, Owens and Ester.

2. The court committed clear error as to Barnett, Owens and Ester in entering additional supplemental findings of fact III, V, VI, VII, VIII (R.108-110) and supplemental conclusions of law II, IV, V and VI (R.112-113) in the following respects:

(a) Error in law because Barnett, Owens and Ester, being the owners (introductory findings in R.107 and in R.68, par XI and XIc,d) were the only ones entitled to exclusive possession against all the

world, including the plaintiff (R.107-108). This being so, their use of their own property and all improvements thereon could not be attacked by the plaintiff or any other person not proving a a right to possession.

(b) The Supplemental Findings I and II (R.107-108) and Supplemental Conclusion of Law I (R.111) are inconsistent with the remainder of the supplemental findings and the supplemental conclusions because it is inconsistent to state that plaintiff is not entitled to exclusive possession of the land for failure to pay just compensation as decreed in condemnation, and that Barnett, Owens and Ester are the owners (R.68 XI introduction, c, and d; R.107 introduction) and then to make the owners account to non-owners without a finding that they were liable on some other theory; in fact, Supplemental Findings of Fact III, V, VI and VIII (R.108-110) and Supplemental Conclusions of Law II, IV, V and VI (R.112-113) become thus clearly erroneous as to Barnett, Owens and Ester although consistent and correct as to the parties to the contract. If the plaintiff was not entitled to exclusive possession of the land, how then can the plaintiff be damaged for the owner's use thereof

in the absence of some other theory of law giving a right for damages? The court has committed error in failing to distinguish between the landowners, joint appellants Barnett, Owens and Ester, and the original parties to the contract, to-wit, A. E. Sherman (R.64, findings III) who was the alter ego for Virgil J. Pague (R.64-65, findings IV and V), both of whom participated in an assignment, made in the office of plaintiff's agent, to the Century Investment Corporation (R.65) on July 3, 1953. Not until five months later or in November of 1953 does appellant Ester purchase Building 105 (R.70d); nor until January 20, 1954 do appellants Barnett and Owens purchase Building 104 (R.69c). It is clear they were, and are, not parties to the contract.

3. If the argument so far be correct, then no accounting is due from Barnett, Owens and Ester, and no judgment for damages or portion of the Special Master's fee can be assessed against them. It is due from the parties to the contract—A. E. Sherman and his alter ego Virgil J. Pague, and Century Investment Corporation, their assignee. But, in any event, the Special Master's report is objected to as being clearly erroneous, inadequately done, and his fee exorbitant for the time spent, the amount involved, and because it is in excess of the compensation of a federal judge.

ARGUMENT

Specification of Error No. 1.

The supplementary findings and conclusions do not support a judgment against Barnett, Owens and Ester, but support a dismissal; and are inconsistent and clearly erroneous.

In *Sun Mutual Life Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 27 L.Ed. 337, the court, reversing the decree, held that a conclusion, stated as one of law, must be upheld by express finding of fact, and quoted from *The Annie Lindsley*, 104 U.S. 185, 188:

> " 'The question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree.' The findings of fact being in the nature of a special verdict, we cannot correct them by inquiring into the evidence, nor supply any ommissions by intendment or inference . . . "

The court, at page 501, also quoted from Chief Justice Marshall in the case of *Barnes v. Williams*, 11 Wheat. 415:

> "Although there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it,and the court could not upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff";

and, at page 508, the court said other findings negative the conclusions of law.

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agency, or by a jury, this court may reverse findings of fact by a trial court where 'clearly erroneous.'" *U.S. v. Gypsum Co.*, (1947) 333 U.S. 364, at 395.

A finding that a will was delivered by a testator to his wife with directions to destroy it, and that she destroyed it by burning in the family apartment and in the testator's lifetime, is insufficient to support a judgment that the will was legally revoked, where it fails to show compliance with the statutory requirements that a destruction of a will, to be effective as a revocation, must have been in the testator's presence as well as with his consent. *Re Wind*, 27 Wn. 2d 421, 178 P. 2d, 731, 173 A.L.R. 1276.

In *Hyde v. Booraem* (1842) 16 Peters 169, at 176, Justice Story said:

> "We can only re-examine the law, so far as he has not pronounced upon it, upon a statement of facts, and not merely a statement of the evidence of facts, found in the record in the nature of a special verdict on an agreed case.
>
> " . . . the question . . . is, whether, in point of law,

upon these facts, the judgment can be maintained. We are of the opinion it cannot be . . . "

The judgment was reversed with the direction to dismiss.

In *U. S. v. King* (1849) 7 Howard 833, at 847, the court said that although no statement of facts was filed until after the appeal:

" . . . The facts upon which the question of title arises are as fully before us as if they had been set forth in the form of a case stated . . .

" . . . the question in the Superior Court necessarily is whether the judgment of the court below was erroneous or not upon the facts before it, as they are certified in the record . . ."

The court then went on to hold that the judgment was erroneous on two grounds and must be reversed, at page 854.

In *Ward v. Cochran* (1893) 150 U.S. 608, 27 L.Ed. 1198, 14 S.Ct. 233, a new trial was granted on the ground that the verdict was insufficient to sustain the defendant's title by adverse possession in failing to find that such possession was actual and exclusive.

Inconsistency of Findings and Conclusions

The Findings of Fact and Conclusions of Law dated October 20, 1955 (R.62) were amended by Supplemental Findings of Fact and Conclusions of Law entered on April 26, 1956 (R.107), wherein the court reaffirmed the findings

and conclusions entered on October 20, 1955 "in their entirety except that they are modified only as to the specific details enumerated here." (R.110, par VII). Summarized, the supplemental findings of fact are:

I (R.107-108)

That it was incumbent upon the plaintiff to prove its exclusive right of possession of the land upon which the buildings have, at all times material to this action, been and are now located.

II (R.108)

That the plaintiff has not fully sustained its burden, in that, although the judgment on the declaration of taking and the judgment awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the Court cannot find that such installments have been paid and accordingly the Court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said building and clear the site upon which they stand. This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate.

III (R.108-109)

That the present and only estate in the land claimed by

the plaintiff expires on July 1st, 1956 and plaintiff has no further intention of renewing or extending said estate. That the defendants, so far as existing judgments and the orders of the court are concerned, will be entitled to the exclusive possession of said real estate and it would be more burdensome to them, than advantageous to the plaintiff, to require the defendants to specifically perform this court's previous contemplated order of building removal and site clearance. That from practical and compensatory standpoints the Court now finds that it is more just, considering the material equities and the law to, instead of compelling specific performance of removal and site clearance, require the defendants to pay a fair, reasonable, and just compensation by way of damages for their failure to remove and clear the sites of and for their wrongful commercial use of, said buildings and comply with all the requirements of the contract of sale.

V (R.109-110)

As to joint appellants Barnett and Owens, a fair, reasonable and just award of damages to be awarded to the plaintiff against said Barnett and Owens and defendant Century Investment Corporation, jointly and severally, is the sum of $3,709.31.

VI (R.110)

That as to defendant Ester, a fair, reasonable and just

award of damages to be awarded to the plaintiff against Ester and the marital community and the defendant Century Investment Corporation, jointly and severally, is the sum of $2,432.59.

VIII (R.110-111)

That a reasonable fee for services rendered by the Special Master is the sum of $2,500.00, together with the sum of $83.00 for a court reporter, three-fourths of which are to be paid by all of the defendants, and each of them, their obligation to be joint and several, one-fourth to be paid by the plaintiff.

The court also finds that, although the Master found the defendant Century Investment Corporation did not directly receive the profits of commercial use of the buildings, it nevertheless is liable for all damages and for three-fourths of the sums stated in paragraph VIII.

Summarized, the Court's Supplemental Conclusions of Law are:

I (R.111)

That it was incumbent upon the plaintiff to prove its right of possession of the land upon which the buildings, furniture, furnishings, equipment and appurtenances herein involved have, at all times material to this action, been and are now located and that the plaintiff did not fully sustain that

burden and it therefore is not entitled to an order of this Court compelling the present owners of the land involved herein to remove the buildings and clear the sites upon which they stand.

II (R.112)

That the plaintiff is entitled to be compensated by the defendants by way of damages for their failure to remove and clear the sites, for the wrongful commercial use of said buildings and to comply with the removal requirements of the contract of sale entered herein on July 14, 1953.

The remaining conclusions (R.112-113) repeat the award of damages and direct payment of the Master's fee as in the findings.

The court in commencing its supplemental findings of fact and conclusions of law (R.107) stated:

> " . . . and the said defendants, being the owners of the real estate involved in this action and identified in Paragraph XI of the Findings of Fact and Conclusions of Law entered by the Court on October 20, 1955 . . . "

reiterated its previous findings that, as to the lands underlying Building 104, Barnett and Owens were the owners, and, as to the lands underlying Building 105, Ester was the owner. (R.68, par. XI.)

The foregoing indicates that the Supplemental Findings of Fact I. and II (R.107-108) and Conclusion of Law I. (R.111) fail to support the judgment, and that they are in-

consistent with the other supplemental findings and conclusions. They are also inconsistent with the original findings and conclusions as appears from the following summary:

Findings of Fact III, IV and V (R.64-65) conclusively show that A. E. Sherman was the alter ego of Virgil J. Pague. Consequently, for all damages which may be due plaintiff, Century Investment Corporation, A. E. Sherman and his alter ego, Virgil J. Pague, are solely liable as parties to the contract. As a matter of fact, since it clearly appears by paragraph VI of the findings (R.66) that there was no such "person" as the Century Investment Corporation at the time the assignment was made to it by A. E. Sherman, this would mean that the original party liable on the contract was Virgil J. Pague, as the principal of A. E. Sherman.

Conclusion of Law No. IV (R.74) is that the contract of July 14, 1953 was valid and in compliance with the Lanham Act. The contract, however, is not valid against the landowners, Barnett, Owens and Ester. Neither the plaintiff nor any contracting party with plaintiff to remove the buildings has the right to go upon said property. By the plaintiff's failure to prove payment of just compensation it leaves the owner complete sovereign of his property and everything situate thereupon. It is submitted then that the contract from the beginning was never applicable to Barnett, Owens and Ester under Supplemental Findings I and II (R.107-108 and Supplemental Conclusion I (R.111).

Paragraph X (R.77) of the Conclusions of Law is that

Barnett, Owens and Ester acquired no better title than Century Investment Corporation had and were not innocent purchasers without knowledge and notice of the contract's express requirements that the buildings be removed from the site. As owners of the land, Barnett, Owens and Ester had better title than anybody else in the world. The plaintiff had nothing. Century Investment Corporation had no better title or right to go upon the land of Barnett, Owens and Ester than plaintiff did and the plaintiff as detailed above had no right of possession according to the Supplemental Findings I and II (R.107) and Supplemental Conclusions I. (R.111).

Since by the Supplemental Fndings (R.107) and Conclusions (R.111), plaintiff failed to sustain the burden of proof regarding its right to exclusive possession, and since it has been expressly found plaintiff has failed to pay just compensation, the owner then is the one with exclusive possession; then neither the party-plaintiff nor the Century Investment Corporation could come on the property without the consent of the owner to whom the fee reverted by the plaintiff's own default over many years.

Finding of Fact XII (R.70) is that Barnett, Owens and Ester acquired their respective interest after the date of the contract; the balance of the Finding is almost completely amended by the Supplemental Findings I and II (R.107-108). Barnett, Owens and Ester, the former on January 20, 1954 (R.69c) and the latter in November, 1953

(R.70d) took immediate possession thereof and immediately started to codify the same and held the same adverse to all the world including plaintiff (R.73).

Not Parties to Contract

Not being parties to the contract sued upon by the appellee, the joint appellants, Barnett, Owens and Ester, contend that it is an unjust and unconstitutional taking of property in violation of the Fifth Amendment to the Constitution of the United States to hold them liable for damages by way of an accounting of rents derived from property which by operation of law had reverted to them as fee owners.

The failure of the court to hold that the only parties liable for damages are the parties in privity to the appellee by way of contract and that these are the other joint appellants herein, to-wit: Century Investment Corporation and Virgil J. Pague, is error (R.144, Item 8). Century Investment Corporation signed and accepted an assignment of the contract (R.65,20) made out in the office of the agent of appellee; Virgil J. Pague was found by the court to be the real party in interest acting through his alter ego, A. E. Sherman, (R.64-65, par. III, IV and V) who signed the contract. The court also found that Pague negotiated the contract and later promoted the Century Investment Corporation, becoming its president and signing the performance bond (Plaintiff's Ex. 7).

Because Barnett, Owens and Ester are not parties to the contract, and because the land reverted to them as fee owners for failure to pay just compensation, together with all improvements thereon, it was error (R.144, items 6 and 7) to make a reference to a Master (R.82) for an accounting of rents and profits received by them from the lands and improvements; and it was further error to assess a portion of the Master's fee or costs against them (R.116 2.) for the fee and costs are chargeable wholly against the parties to the contract.

> "The obligation of contracts is in general limited to the parties making them. Only those who are parties are liable for a breach of a contract. Parties to a contract cannot impose any liability upon a stranger to the contract under its terms. In the case of a written contract, ordinarily only those who are named in the contract are bound thereby. A person who is not named in, or bound by, the terms of a written contract cannot be rendered liable on it by a mere intention that he should be bound, although he was known to, and was in direct communication with, the obligee when the contract was executed." *12 Am. Jur. 812*, Section 265.

> "The obligation of contracts is, in general, limited to the parties making them. In order to bind a third person contractually, an expression of his assent is necessary." *12 Am. Jur. 514*, Section 17.

Nor can any provision of the Lanham Act impose any obligation on Barnett, Owens and Ester:

> "The law will not imply a contract to do a thing merely because a statute imposes a duty to do that thing. It has been said that neither a statute nor a rule of law raises an implied promise. There must always be the fact of a consideration outside of and in addition to the statute or the rule of law; and the promise is implied rather from the consideration than from the statute." *12 Am. Jur. 504,* Section 6.

Reverter to Appellants

The government can show no paramount title, and having no rights whatever, it cannot convert an action for exclusive possession into one for rents for use of improvements, i.e., against a landowner not a party to the contract.

The law is well settled that upon abandonment of private property taken for public use, the owner of the fee holds the land free of encumbrance.

> " . . . When, however, only an easement has been acquired for the public use, by condemnation, purchase, prescription, or dedication, if the use for which the land was taken is formally discontinued, permanently abandoned in fact, or *becomes impossible* or the land is devoted to a different and inconsistent use, the easement expires and the owner of the fee holds the land free from encumbrance. *In any such event the right to*

possession does not remain in the condemning party, but reverts to the owner of the fee." (Italics added). 18 Am. Jur. 747, Sec. 124.

The rule is stated in 3 Nichols, Eminent Domain (3rd Ed.), section 9.36 (5), and (6):

"When only an easement has been taken, it is within the power of the corporation holding the easement to remove its *structures* from the land prior to abandonment; but if they are *allowed to remain after the possession has revested in the owner of the fee the ownership of the structures follows the land.* So, also, when the effect of the structures is to protect the owner's remaining land from injury, it has been held that he is entitled to have them remain.

"After the public easement has been lost by discontinuance or abandonment, *it is as if it had never existed,* and it cannot be restored by revoking the order of discontinuance, or by attempting to resume possession, or in any other way than by a new condemnation proceedings and the payment of full compensation." (Italics added.)

"The United States is required to pay just compensation for the property taken and if just compensation has not been paid, and its officers wrongfully hold possession, they may be ejected. *U.S. v. Lee,* 106 U.S. 196 1 S.Ct. 240, 27 L.Ed. 171.

"If in the proceeding here, or in any condemnation proceeding where the judgment was given in the exact language of the declaration here, but the United States deposited only the rental value for one year and paid nothing for a property interest attempted to be created by such language for an additional period, the United States could hold only for one year under the judgment. *It is axiomatic that the United States will obtain only the exact property for which 'just compensation' has been paid no matter what the recitals of the judgment. An attempt to exercise the so-called option would be invalid.* At the end of the year the landowner would be entitled to maintain ejectment notwithstanding the inclusion of such language in the judgment." *United States v. Crown-Zellerbach Corp.*, 60 F. Supp. 853, 860.

"Where there is delay in the payment of a condemnation judgment, it cannot reasonably be said that its payment at some later date will amount to just compensation, because the owner in such cases is deprived of the full and beneficial use and enjoyment of his property without legal process or compensation." *Feldman vs. Chicago,* 363 Ill. 247, 2 N.E. 2d 102, 105).

In *Thomison v. Hillcrest Athletic Assn.,* (Del. 1939), 5 Atl. 2d 236, the plaintiff brought an *action in trespass* against the athletic association on the ground that title to the property, originally taken by condemnation for school purposes, reverted to plaintiff upon its abandonment for school pur-

poses and prior to its conveyance to defendant. In the course of its opinion, the court said:

"The right of individuals in the ownership of property must, of necessity, bend to the requirements of public use and so the right of eminent domain had its origin . . . . The use must be a public use and the Constitutions, both Federal and State, have added the further limitation that private property *may not even be taken for public use without just compensation.*

"Having in mind that private ownership of property must give way to a definite public need or to a desire to subject that property to a public use, but because the right to own and to retain property is one of the most cherished and sacred rights of a free man so the *Courts have rather uniformly considered that Statutes providing the right of eminent domain should be strictly construed* . . . . The *strict construction* of eminent domain statutes applies both to the amount of property to be taken and *to the quantum of the estate or interest,* and it is generally held that unless the statute provides that a fee simple title shall be acquired, or a fee is necessary for the purposes for which the land is taken, that only an easement or qualified fee is taken by the eminent domain proceeding.

"A reversioner in an eminent domain proceeding has no general power to accelerate his right of reversion and it is a mere dormant right dependent upon the ac-

tion of that party for whose benefit the property was condemned.

"The mere fact of improvements or transformations are not unusual on lands taken by condemnation and cannot in themselves change rules of law except by clear application.

"We see nothing in the statute which expressly or by implication changes the rule of law to the effect that while private ownership must give way to the public use yet *when that public use is voluntarily and finally relinquished the property reverts to him from whom it was adversely taken.*" (Italics added.)

Where a railroad was granted a right of way and laid track on it, and afterward abandoned the road, without removing the rails, they became the property of the owner of the land through which the right of way passed. *Missouri Pac. Ry. Co. v. Bradbury, 106 Mo. App. 450, 79 S.W. 966.*

Naturally enough the rule of reverter finds expression most frequently in the law of landlord and tenant. Reversion, because of abandonment or failure to pay just compensation in condemnation cases, is less frequent. But reversion is strictly applied in condemnation cases because acquisition of private property for public use is not a matter of contract, but of involuntary taking.

In *Toellner v. McGinnis (1909), 55 Wash. 430, 435, 104 Pac. 641,* in an action by the tenant for rents and two-thirds of the value of a building, Judge Chadwick said:

" . . . we are of the opinion that the default in rent and re-entry, under the terms of the lease, work a forfeiture of all right to rents subsequently earned . . . "

"It must also be admitted that the right to remove improvements or exact pay therefor, after the term, depends entirely upon the contract of the parties and was unknown to the common law — 'a strong invasion upon it,' as has been aptly said. There is another fundamental principle that suggests itself . . . and that is that, whatever may be the form of the contract or manner of stating it, the building becomes, as it is erected brick by brick and stone upon stone, a part of the land. So that, after all, from the very nature of things, the question is not a question of title reserved in the lessee, or the right to maintain title on the part of the lessor, but primarily a question of compensation; a right, if any, to recover the value of the building or declare a lien and enforce it as an equitable remedy. When so considered, the only question remaining is whether, under all the facts, appellants are entitled to such compensation. A similar contract was before the court in *Kutter v. Smith*, 69 U.S. 491, 17 L.Ed. 830, wherein it was held that, in the absence of a covenant to remove within the term, the contract did not change the rule that the building became a part of the land and the title was in the lessor. . . .

"By the terms of the contract respondent had the right to re-enter in case of default in rent, without any engagement to account for the rent or profits thereafter accruing, and whatever the phraseology of the contract may be, if our theory be correct, a forfeiture resulted. Or, if another term be softer, the lease and all defendants' rights thereunder were voluntarily surrendered. . . . That another takes the fruit of their labor is attributable to their own fault, and the law cannot relieve them (Citing cases)."

Kutter v. Smith, 69 U.S. 491, 17 L.Ed. 830, was an action against the fee owner, to recover damages for the value of a building placed on leased premises. Upon the tenant's failure to pay rent, the landowner retook possession, and Justice Miller said, in part:

"The character of the building, in the present case, does not bring it within any of the principles upon which certain erections have been held removable as fixtures.

"The doctrine, concerning this class of fixtures which is a strong innovation upon the common law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while the tenant is in possession; *and has never been held to give a right of action against the landlord for their value.*

"The well settled rule is, that such erections as this

become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contract. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event. This contingency has not occurred, and that it can never occur is the *fault of the plaintiff* and his assignor. This observation is also applicable to the supposed hardship of taking the building, the product of the plaintiff's money and labor, without compensation. It is from plaintiff's own default that the right to do this arises. *He had his option to pay the rent due defendant, and retain the right to payment for his building, when the time should arrive, or to give up his building, and with its loss relieve himself of the burden of paying rent. He chose the latter with the full knowledge, and there is no injustice in holding him to the consequence of his choice.*" (Italics added.)

Our own Ninth Circuit Court of Appeals, in *Societa Italiana Di Mutua Beneficienza v. Burr (1934), 71 F.2d 496,* applied the rule. The syllabus states:

"Tenant's right to remove fixtures expires with forfeiture or other termination of lease."

"An easement acquired by condemnation ceases when the public use ceases. . . . The owner of the fee has a right to recover the property or to re-enter and to use it just as though it had never been condemned, possession and all other incidents of dominion and ownership reverting to him." *30 C.J.S. 219, § 460.*

"The rights acquired by condemnation proceedings may be lost by abandonment. An abandonment will be more readily inferred where an easement is acquired for public purposes than where it was created for a private use.

"Abandonment is made up of two elements, acts and intention. . . . The abandonment need not appear on record. . . . Whether there has been an abandonment is ordinarily a question of intention, to be determined by the jury, or the court sitting without a jury, from all the circumstances. . . . " *30 C.J.S. 217, § 458.*

In summary, the Supplemental Findings of Fact I. and II (R.107-108) and Conclusion of Law I. (R.111) which state that the plaintiff failed to prove its exclusive right of possession of the land, do not support a judgment against Barnett, Owens and Ester. Nowhere in the Findings is a determination made that Barnett, Owens and Ester were parties to the contract upon which this action is based. No other theory of liability and damages is raised in the pleadings or suggested in the Findings. The Findings do not support the judgment and it follows that the judgment must

be reversed as to these appellants.

In law, upon the abandonment of private property by the condemnor, the property revests in the owner of the fee, together with the improvements placed thereon. This well-settled principal of law makes mandatory a dismissal of this action as to Barnett, Owens and Ester. Upon plaintiff's failure to prove its right to possession of the property under the judgment of condemnation, all rights of the plaintiff in and to the land and the structures on it terminated and title thereto revested in the owners of the property, Barnett, Owens and Ester. There can be entered in this action no judgment against Barnett, Owens and Ester for the use of their own property or the improvements thereon.

ARGUMENT ON SPECIFICATION OF ERROR No. 2

The trial court denied (R.48) the motions of Barnett, Owens and Ester to dismiss the action as to them because the plaintiff's complaint failed *to state* a claim. The trial court also denied (R.119) their motion to dismiss them after trial for plaintiff's failure *to prove* a claim on which judgment could be based (R.118, item II).

The following summary of the complaint shows that the motion to dismiss these appellants for failure to state a claim should have been granted.

The complaint (commencing R.3) alleged that on July 14, 1953, the defendants A. E. Sherman, Virgil J Pague and Century Investment Corporation entered into a contract in

writing with the Director of Public Housing Administration (R.4) for the sale and removal of buildings, and for site clearance. The contract further provided that the purchaser would be liable for any expense incurred by the government as a result of purchaser's failure to abide by the terms of the sale, including removing of the units sold within the time stated and leaving the site in a satisfactory condition. The time for completion under the contract was November 2, 1953. On the date of the contract, a performance bond in the sum of $5,000.00 was executed by Century Investment Corporation, thru Virgil J Pague, its president, as principal, and by the Hartford Accident & Indemnity Company, as surety, in favor of the Housing Authority, City of Seattle, Washington. The complaint stated that the Authority was "acting as the agent of the Public Housing Administration, to insure the condition that the obligation of the Century Investment Corporation that it would do all the work and furnish all the materials for the removal of buildings and site clearance and faithfully perform all the conditions of said contract." (R.7)

The buildings were described in the complaint as not having been removed.

By paragraph VIII of its complaint the plaintiff alleged, "that the plaintiff, The United States of America, *at all times herein mentioned,* had and does now *have exclusive use* of

said real property upon which said temporary dwellings are presently located and the acts of the defendants alleged herein have damaged and are damaging the plaintiff's exclusive use of said land and are in flagrant violation of the laws of the United States of America relating to temporary war housing." (Emphasis added.)

The complaint (R.7, par. VI) alleged that A. E. Sherman, Virgil J. Pague, Arthur G. Barnett, Carl W. Pague, Donald F. Owens and Edward R. Ester, individually and in behalf of the marital communities, purchased four of the temporary buildings (R.6) from the Century Investment Corporation in violation of the terms of the contract, and rented the dwellings. This is the only place that joint appellants Arthur G. Barnett and Donald F. Owens, acting as a partnership and joint appellant Edward R. Ester are mentioned in the complaint; they appear as third party purchasers, not as parties to the contract, and deny they bought from Century Investment Corporation.

It is alleged that the defendants and each of them knowingly acted in direct violation of paragraph 8 of the contract, Ex. "B" (R.13), which provided that "neither this contract nor any interest therein shall be assigned or transferred by the purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U.S.C. 15)." No evidence was offered of an assignment involving Barnett, Owens and

Ester; plaintiff assisted Sherman and appellant Virgil J. Pague in assigning to Century Investment Corporation (R.65-66).

Plaintiff prayed that the surety company be ordered to remove the buildings in accordance with the contract, that the parties be restrained from interfering with the plaintiff's interest in the real property and temporary buildings, and for damages for failure of Century Investment Corporation to complete its contract by November 2, 1953, thus requiring the plaintiff to extend the term of exclusive use of said property from Feb. 1, 1954 to Feb. 20, 1955. Plaintiff also prayed for an accounting by all parties of funds collected from tenants or other sources for unauthorized use of the temporary buildings and the land upon which they were situate, for a reasonable rental to the plaintiff for the use of the property by the defendants, and that title of defendants to the temporary building be forfeited and that the plaintiff have the full and complete title thereto free from all encumbrances.

Plaintiff should have pleaded its title by condemnation, setting forth its payment of the just compensation required by the decree of condemnation. The mere allegation of exclusive possession was and is insufficient.

The appellants answered the complaint as follows:

The answer of Ester (commencing R.24) denied that he and his wife were parties to the contract; admitted purchase of Building 105 and that the same was being rented; denied that it was purchased from Century Investment Corporation

and denied acting in violation of any contract or any law (R.25). Ester further denied that plaintiff had exclusive use of the real property and the temporary buildings and further denied taking an assignment of any interest in the contract (R.25).

As additional defense, Ester alleged there was no privity of contract between himself and the plaintiff and that he was under no contractual or legal obligation to remove the housing purchased (R.25-26). That the housing was not temporary and that it was not within the purview of the Lanham Act; that to require removal of Building 105 would be inequitable, unjust and oppressive and deprive Ester of his property and property rights without due process of law; that Ester in good faith expended large sums of money in improving and converting Building 105 from temporary into permanent housing, and to purchase the land on which the building was situate, the removal of which would cause the defendant grave financial loss, and would be of no benefit or advantage to the plaintiff, and that the plaintiff would suffer no damage whatever if said building is not removed from its site.

As a first affirmative defense (R.27) he alleged that the Public Housing Administrator sold the buildings to the Century Investment Corporation, vesting said purchaser with full power and authority to resell the housing and to vest the re-purchasers with full legal title; that thereafter Century Investment Corporation sold Building 105 to one Carl W.

Pague who in November of 1953 resold and delivered Building 105 to Ester for a valuable consideration; that before purchasing the building Ester inquired as to the right to keep it on site and rent it; that Virgil J. Pague, individually and as president of Century Investment Corporation, stated and represented that it was lawful and proper to keep the building on site, provided it was remodeled and renovated in compliance with the Building Code requirements of the city of Seattle; further, that other buildings involved in the contract had been rented for months with the full knowledge, permission and acquiescence of the Public Housing Administrator; that Ester had talked with the agent of the Public Housing Administrator and was assured by him that Building 105 could be lawfully rented on site and that it would not be necessary to remove it, provided it was made to comply with the Building Code of the City of Seattle; that relying on these reassurances, Ester purchased Building 105 and the land upon which it was situate and, under proper permits from the city of Seattle, renovated it in compliance with the Building Codes of the city, removing and replacing plumbing and connecting sewers, installing new oil burners and storage tanks, placing new siding on the exterior, reinforcing the foundations, renovating and rebuilding the kitchens, installing new gas ranges and new refrigerators, and doing other work to convert the temporary housing into permanent housing in compliance with the Building Codes; that the amount expended for said buildings, land and im-

provements was in excess of $16,000.00. That Ester was led to believe by the fact that other buildings on site were being rented without molestation or interference by the plaintiff that it was lawful so to do and that plaintiff had waived its requirements for their removal.

For a second affirmative defense, Ester alleged that the judgment in the condemnation proceedings, under which the plaintiff was granted the right to lease the land underlying Building 105, provided for a year-to-year tenancy, commencing February 21 of each year upon notice, and that the plaintiff had failed to obtain the consent of Ester to renew its lease and, further, *that plaintiff had failed to pay* or tender the *rental due* therefor prior to February 21, 1954; that by reason of such failure the *plaintiff had either abandoned the lease or waived or lost its right* to renew the same; and that since February 21, 1954, the plaintiff has not had and did not have any right to the use of the land owned by defendant on which Building 105 is situate and no right or title whatever in the land or building and that the plaintiff was without any legal right to enter upon the land for any purpose whatsoever without order of court or the consent of Ester.

Barnett and Owens repurchased Building 104. Their answer (commencing R.39) in most material respects is the same as that of Ester. They admit the purchase of Building 104 and admit that apartments have been rented. They denied that they purchased the building from Century Invest-

ment Corporation and further deny that Building 104 is temporary. They denied taking any interest by way of assignment; and *denied that plaintiff had exclusive possession of the real property upon* which Building 104 was located.

By way of additional defenses, Barnett and Owens alleged that the complaint failed to state a claim against them; that they were not parties to the contract for the violation of which damages were sought by the plaintiff, that Building 104 had been changed from temporary to permanent housing in compliance with the codes of the city of Seattle governing the occupancy of dwellings by human beings; and that the removal of permanent housing would not be in the public interest.

For a fourth defense, they claimed that the plaintiff had abandoned its use of the land, and asserted that they had expended the sum of $17,484.91 for the purchase of the land underlying Building 104; and that the plaintiff was, without good reason, attempting to renew its lease for the sole purpose of clearing the land, only to return it to Barnett and Owens so that plaintiff would not be subject to an action for damages for failure to clear. For a fifth defense, Barnett and Owens alleged that the plaintiff was attempting to deprive them of their property without due process of law.

For a first affirmative defense, Barnett and Owens alleged that, during the latter part of November, 1953, they were advised that Buildings 102 and 103 were occupied by tenants, that the city of Seattle had allowed occupancy of these

buildings after compliance with the Seattle Building Codes, that the plaintiff had advised that, if the title to the lands and the units were merged and Building 104 was made to comply with the Building Codes, this would constitute a removal under the laws of the United States. Relying thereon Barnett and Owens repurchased a portion of Building 104 from third party purchasers R. M. Scougal and F. T. Crowe (R.69c) who purchased from Century Investment Corporation, the remaining portion of Building 104 being repurchased from Virgil J. Pague for the sum of $4,696.00. That they thereafter expended, to comply with the Building Codes of the city of Seattle, approximately $17,337.14, excepting $3,100.00 thereof used for the purchase and installation of new gas stoves, meters, new Westinghouse refrigerators, and that an additional sum was being expended on the heating plant and heating system; and that it would be a useless act and expense to compel Barnett and Owens to remove Building 104.

After the formulation of the issues by the answers and after trial the effect of the motion to dismiss for failure *to prove* a claim on which judgment could be based, becomes doubly clear. As a matter of law, Barnett, Owens and Ester should have been dismissed for there is no legal basis on which judgment for damages can be entered against them.

It is not alleged, and it is not proved, that Barnett, Owens and Ester are parties to the contract for a breach of which

damages are assessed. No other theory of liability is alleged or proved.

It follows that Barnett, Owens and Ester as owners are not accountable for rents received as determined by any report of the Special Master. Any damages suffered by the plaintiff for breach of its contract must be recovered from the parties thereto or their assignees, if any. The assignee of A. E. Sherman was the Century Investment Corporation. This leaves the judgment for damages, based on the accounting of rents received for breach of contract, good against Virgil J. Pague, the principal of A. E. Sherman, who originally signed the contract, and the assignee, Century Investment Corporation.

Actually, as exhibits offered at the trial, there are indemnity agreements running from Virgil J. Pague to Century Investment Corporation (Ex. 17 for Bldgs. 102 & 103; Ex. 18 for Bldgs. 104 &105). The pattern of liability for the breach of the contract on which this action is based, is clear. Barnett, Owens and Ester are not liable under any theory or under the facts adduced at the trial.

The motion to dismiss for failure to state a claim against these appellants should have been granted. The motion to dismiss for failure to prove a claim on which judgment against these defendants could be based certainly should have been granted.

ARGUMENT ON SPECIFICATION OF ERROR No. 3

This specification of error is directed toward the report and supplemental report of the Special Master (R.84, 85-91) and the objections to these reports by Barnett, Owens and Ester (R.97-105 incl.). The errors of the Special Master were carried into the judgment for damages, and his use of improper accounting methods as to these appellants seriously prejudiced Barnett, Owens and Ester.

On October 21, 1955, the court entered its order directing a reference and appointing a Special Master (R.82-83). This order provided that the Special Master "report to this Court his findings of fact and conclusions thereon as to the total profit. . . ." The accounting was to be made from original records and the total profit "shall be the difference between the total gross revenue received from the commercial use of each of said buildings and the current or normal operating expenses of each; except that said expenses may also include depreciation, based on current Internal Revenue Service useful life standards, for the minimum capital expenditures only, necessarily incurred in conforming said buildings to requirements of the city of Seattle."

The Special Master filed a report on the 16th of December, 1955 (R.133, item 95), only a portion (R.84) of which is set forth in the record, for two reasons: First, the Supplemental Report of the Special Master was the one used by the

court (R.107) and it was filed on January 18, 1956 (R.85); secondly, the portion set forth from the first report (R.84) was inserted for camparison with similar matter set forth in the Supplemental Report (R.89). Although the trial court in its Supplemental Findings of Fact and Conclusions of Law (R.107) refers to having theretofore entered an Order approving and confirming the Supplemental Report of the Special Master filed on January 18, 1956, the court does not thereafter make the Supplemental Report of the Special Master a part of its findings although the court does adopt the Special Master's computations (R.115).

a) Maintenance and repair items were capitalized and were not allowed as expenses to be deducted against current income of Barnett, Owens and Ester, when similar items were allowed as expense deductions for Pague against current income (R.100, par. VI - R.102). The result was to allow 100% of the expense items to be deducted by Pague in the year they were incurred while allowing only a deduction of 20% for the same items in the year they were incurred by Barnett, Owens and Ester, leaving the balance of 80% to be recovered by Barnett, Owens and Ester over a future period of approximately twenty years (R.100, par. VI; R.88, Ex. "B"; R.90, Ex. "C"). The record (R.100-102) covers numerous examples of such unjustified discrimination. For example, Pague is allowed a deduction of 100% of the cost of windows while Ester is allowed only 20% on similar glass items; Pague is allowed a deduction of 100% for electrical

repairs while Barnett and Owens are allowed only a deduction of 20% for electrical repairs. The exceptions cited in the record disclose similar discrimination for boiler room motor repair, lumber and burner repair, window shades, refrigerator repair, painting, faucets and plumbing items and garbage cans. If the cost of his garbage cans may be deducted 100% in one year for one litigant, why should the other litigants have to wait twenty years to recover the cost of their garbage cans?

Error is further claimed in the disallowing of miscellaneous and small expenditures made by Ester on the ground that they could not be supported by receipts while similar and identical items not supported by receipts as deductions by Pague were allowed. Expenditures claimed but not supported by vouchers by Ester amount to the sum of $1,809.85 (R.90, item 1). But, the Master allowed Pague deductions of $2,066.24 for expenditures claimed but not supported by vouchers (as set out in detail on R.98, par. V - R.100, up to but not including item "B"). In addition, the Master allowed to Pague an allocation of $2100.00 as repair and maintenance from Uptown Motors without receipts or vouchers (R.99.)

Comparing the allowances made by the Master for fuel costs, further error is apparent. The Master allowed Pague a deduction for fuel of 33.224% of gross income; he allowed Barnett and Owens a deduction of 20.283% of gross income; and he allowed Ester only 11.850% of gross income, as a total

of fuel and truck expense (R.105, Ex. "J").

As the result of these maneuvers by the Master, Pague was allowed a large percentage of his gross income as deductible expense in the years incurred. Pague was allowed 68.003% of gross income as deductible expense, as contrasted with 39.293% for Barnett and Owens and 36.455% for Ester (R.105, Ex. "J", line "total operating expenses"). Correspondingly and because the Master arbitrarily capitalized repair and maintenance expense for Barnett, Owens and Ester, his depreciation figures for Barnett and Owens of 20.372% of gross income and for Ester of 20.693% of gross income are three times larger than Pague's depreciation of 7.202% of gross income.

In summary, this resulted in making Barnett, Owens and Ester's income look large and Pague's small, as follows:

	Gross Receipts in Dollars	Percentage	Net Profit in Dollars	In Percentage
Pague	$27,284.52	100%	$6,765.13	24.795%
Barnett & Owens	13,097.35	100%	5,282.81	40.335%
Ester	8,785.10	100%	3,764.58	42.852%

The net income figures set out above were the basis upon which judgment was rendered against these appellants, and because they were incorrectly computed by the Master their infirmity was carried into the judgment and the judgment itself is erroneous.

(b) Error is claimed in the exception (R.103, par. X) that the Master used a 30-year basis for depreciation on a sum of the digits method. The ruling of the court is set forth at R.115. The Master ignored the order of reference (R.83) which instructed the Master to allow depreciation based on current Internal Revenue Useful Life Standards (R.83, lines 3 to 6). The Master also ignored the 5-year limitation imposed by the City of Seattle's permit for the use of city streets and alleys upon which a portion of the units are situated (R.73). The Master also ignored the 5-year use and occupancy permit granted by the City of Seattle for the buildings owned by the appellants (R.73). Whether or not the 5-year permit would be enforced, Barnett, Owens and Ester, under the Internal Revenue requirements, were compelled to claim the 5-year limitation in their useful life computation on their own tax returns (Def's. Ex. 16) in accordance with the Internal Revenue Service Useful Life Standards (R.94; 103, par. X;)

(c) The inconsistencies in the Master's own reports show clear error. In his original report he showed a net profit for appellant Ester of $3,660.91 (R.85). As a result of a revision in the Master's supplemental report the net profit for Ester is increased to $3,764.59. (R.90). A resulting increase in net profit of $103.68 despite an additional allowance for truck expense of $431.74 (R.84, line 13; R.90, line 6).

The inconsistent method by which this is accomplished is summarized as follows:

	Original Report (R.84 & 85)	Supplemental (R.89 & 90)	Difference Allowed (+ Disallowed (–
Maintenance Labor	$1,035.04	$806.62	$ –228.4
Maintenance Material	832.23	279.87	–552.3
Truck Expense	250.69	682.43	+431.7
Depreciation	1,572.50	1,817.86	+245.3
TOTAL – Deceased Expenses Allowance,			$ –103.6

If the Special Master had been consistent in his own work the additional truck expense allowed in his supplemental report would have reduced the Net Profit by $431.74 instead of increasing it by $103.68 or a total difference of $535.4 which is 16 2/3% of the judgment against Ester.

(d) The joint appellants Barnett and Owens claim a error that the fee allowed the Special Master in the sum o $2500.00 is exorbitant, and that the Special Master did poo work examples of which are (a), (b) and (c). He was ap pointed October 21, 1955 and handed in his first report, a stated above, on December 16, 1955, within a period of little less than 60 days. The accounting involved total rent in the sum of only $48,877.97. For the amount of time in volved and considering that the original records were furn ished (Special Master's Exhibit and Supplement Report Doc 107) the fee is exorbitant. It is far in excess of the compen sation for a U.S. District judge.

The clerk's certificate (R.126, items 95 through item 116) reflects constant motions by the defendants to strike the re port of the Special Master because of his attempts to file con

rary to F.R.C.P. Rule 53(e)(1); thus compelling Barnett, Owens and Ester to force the filings of the Special Master's exhibits, records and transcripts in order to preserve their right of judicial review. Since these motions and the Special Master's reports are all exhibits and accompany the Special Master's reports now before this appellate court, it is believed this reference is proper (R.126, items 95-116). It is inserted here to indicate along with defendants' exceptions the poor work of the Special Master.

Conclusion

Joint appellants, Barnett, Owens and Ester, should be dismissed and the judgment of the trial court reversed as to them.

Respectfully submitted,

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